IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

D. VINCE CARLSON and ANNE K. CARLSON, husband and wife and their marital community,	)	No. 62527-6-I
	)	DIVISION ONE
Respondents,	)	
v.	)	
GAEL GABLE and PATRICIA M. GABLE, husband and wife and their marital community,	)	UNPUBLISHED
	)	FILED: July 20, 2009
Appellants.	)	

Cox, J. — Gael and Patricia Gable appeal a partial summary judgment order and a final judgment in a bench trial. The judgment awards damages against them for their trespasses on adjacent land owned by Vince and Anne Carlson together with attorney fees.

The partial summary judgment order in favor of the Carlsons fails to expressly resolve the legal question of whether and to what extent RCW 58.17.215 affects the 1989 Declaration of Easement that appears to affect the respective properties of these litigants. Because this record does not show that the Carlsons were entitled to judgment as a matter of law, we must reverse that

order.

The judgment and the unchallenged findings of fact and conclusions of law show that trespass damages were awarded, in part, on the basis of an admitted trespass on the Carlsons' property. But these rulings also show that other trespass damages were either awarded or may have been awarded, in part, on the basis of the erroneous partial summary judgment order. Moreover, the attorney fees awarded below must be reevaluated and properly explained by new findings and conclusions for reasons we explain later in this opinion. Accordingly, we affirm the judgment to the extent of damages for the admitted trespass on the property, vacate that judgment to the extent of the other trespass damages, and remand for further consideration. We reverse the partial summary judgment order.

The Carlsons commenced this action against their neighbors, the Gables, to resolve a dispute that arose over the Gables' continued use and clearing of a logging trail and border area on the Carlsons' property. The dispute involved, in part, an easement for "ingress, egress, and utilities" that was created by short plat in 1978.

In 1978, Carl and Joanne Nazarenus, the predecessors in interest to both the Carlsons and the Gables, owned Hollywood Tract 2, a large rectangular parcel of real property in Woodinville. The parcel is bounded on the west by 148th Ave. N.E. and on the east by 152nd Ave. N.E. They recorded a short plat (#777026) that divided the tract, from north to south, into two smaller lots. The

short plat also granted an easement for "ingress, egress, and utilities" that burdened the westerly lot (Lot 1) of the short plat and benefited the easterly lot (Lot 2). This short plat was recorded under King County Auditor's Number 7806080588.

In 1985, the Nazarenuses further divided lot 2 of Hollywood Tract 2 into four lots. They also adjusted the boundary line between the original Lots 1 and 2. This short plat (#284056) was recorded under King County Auditor's Number 8506100631.

In 1989, Mrs. Nazarenus, who appears from this record to have been the record owner of both the dominant and servient estates of the 1978 easement, executed and recorded a Declaration of Easement dated February 27, 1989. It was recorded under King County Auditor's Number 8902270869. The declaration grants a new easement for ingress, egress, and utilities to 152nd Ave. N.E., which is located to the east of the tract, for the lots in Hollywood Tract 2. It also states, in part, "This easement replaces and voids access shown on short plat 248056 from 148th Ave, N.E." This declaration was recorded under King County Auditor's Number 8902270869. The parties dispute whether the reference in this declaration to "short plat 2**48**056" is a scrivener's error and, if so, whether the reference is to the 1978 easement referenced in short plat 2**84**056.

In 1995, persons not parties to this action who had purchased property in the easterly portion of Hollywood Tract 2 from the Nazarenuses, divided that

land into three triangular residential lots by recording short plat S90S0390 under King County Auditor's Number 9504279004 ("1995 short plat"). All of these lots have easement access for ingress, egress, and utilities to 152nd Ave. N.E. to the east by virtue of the 1989 Declaration of Easement.

In 1997, the Gables purchased two lots shown in the 1995 short plat. In 1999, the Carlsons purchased their property, which abuts the Gables' property on the west.

The Gables, without the Carlsons' permission, periodically walked on a logging trail crossing the Carlsons' property. The Gables assumed the logging trail was within the 1978 easement. In 2004, without permission, the Gables began widening and clearing the logging trail. After the Carlsons' attorney corresponded with the Gables, the clearing ceased until 2006. The Gables again began to clear the logging trail in 2006, using a tractor to mow and clear the trees.

The Carlsons commenced this action, seeking a declaratory judgment on several issues, including whether the 1978 easement was abandoned. They also claimed breach of easement and trespass and damages for both. During the litigation, they also obtained an injunction to prevent the Gables from using the easement. A subsequent amendment of the pleadings focused on the alleged extinguishment of the 1978 easement by the 1989 Declaration of Easement.

The trial court granted partial summary judgment in favor of the Carlsons,

ruling that the 1978 easement had been extinguished by the 1989 declaration. The court also denied, without prejudice, the Gables' motion for partial summary judgment that sought a determination that the 1978 easement over the Carlsons' property had not been abandoned.

A trial on trespass damages followed. The court awarded the Carlsons trespass damages as well as attorney fees under RCW 4.24.630. The court subsequently denied the Gables' motion to reconsider.

The Gables appeal.

1978 EASEMENT

The Gables argue the trial court erred by granting partial summary judgment concluding that the easement benefitting their property was legally extinguished by the 1989 Declaration of Easement. We agree.

A motion for summary judgment may be granted when there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law.[1] We review a summary judgment order de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party.[2]

"'An easement is a right, distinct from ownership, to use in some way the land of another, without compensation . . . .'"[3] An easement appurtenant, one

---

[1] CR 56(c).

[2] Khung Thi Lam v. Global Med. Sys., 127 Wn. App. 657, 661 n.4, 111 P.3d 1258 (2005).

[3] City of Olympia v. Palzer, 107 Wn.2d 225, 229, 728 P.2d 135 (1986) (quoting Kutschinski v. Thompson, 101 N.J.Eq. 649, 656, 138 A. 569 (1927)).

that benefits a particular piece of property, necessarily requires a dominant estate that benefits from the easement and a servient estate that is burdened by the easement.[4] An easement may be extinguished at any time if its then holder executes a proper instrument releasing it.[5] "With limited and specific exceptions, once a private easement is depicted on a short plat, the easement cannot be extinguished without amending the plat document."[6]

Here, the Gables do not challenge the sufficiency of the 1989 Declaration of Easement to extinguish the then-existing 1978 easement that benefited the property then owned by their predecessors in interest. Rather, the essence of their argument is that the failure of those predecessors in interest to follow the requirements of RCW 58.17.215 voided the otherwise valid extinguishment of the easement.

RCW 58.17.215 provides in relevant part:

> When any person is interested in the alteration of any subdivision or the altering of any portion thereof . . . that person shall submit an application to request the alteration to the legislative authority of the city, town, or county where the subdivision is located.
>
> . . . .
>
> The legislative body shall determine the public use and interest in the proposed alteration and may deny or approve the application for alteration. . . .
>
> After approval of the alteration, the legislative body shall order the

[4] M.K.K.I. v. Krueger, 135 Wn. App. 647, 655,145 P.3d 411 (2006), review denied, 161 Wn.2d 1012 (2007).

[5] William B. Stoebuck and John W. Weaver, Washington Practice: Real Estate: Property Law § 2.12, at 119 (2004).

[6] M.K.K.I., 135 Wn. App. at 659.

> applicant to produce a revised drawing of the approved alteration of the final plat or short plat, which after signature of the legislative authority, shall be filed with the county auditor to become the lawful plat of the property.

The statute does not define the word "alteration." Presumably, the word carries the meaning found in a dictionary.[7] According to Webster's Third New International Dictionary, "alter" means "to cause to become different in some particular characteristic."[8] An "alteration" is defined as the result of altering or as "a change in a legal instrument that changes its legal effect either in the obligation it imports or its force as legal evidence . . . ."[9]

We also note that RCW 58.17.225 exempts certain easements from the requirements of the above statute:

> **Easement over public open space** . . . .
> The granting of an easement for ingress and egress or utilities over public property that is held as open space pursuant to a subdivision or plat, where the open space is already used as a utility right-of-way or corridor, where other access is not feasible, and where the granting of the easement will not impair public access or authorize construction of physical barriers of any type, may be authorized and exempted from the requirements of RCW 58.17.215 by the county, city, or town legislative authority following a public hearing with notice to the property owners in the affected plat.

This reference to certain types of easements that are exempt from the

---

[7] See Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005) ("If the undefined statutory term is not technical, the court may refer to the dictionary to establish the meaning of the word.").

[8] Webster's Third New International Dictionary 63 (1969).

[9] Id.

statutory requirements of RCW 58.17.215 indicates to us the legislative intent to generally require that those who seek to alter easements created by short plat must apply to the relevant legislative authority for approval under the provisions of this statute.[10]

We also note that in M.K.K.I. v. Krueger,[11] Division Three of this court held that the subdivision statute, chapter 58.17 RCW, applies to private easements.[12] There, Yakima County and M.K.K.I., the purchaser of a lot of land, brought an action for declaratory judgment against the sellers and their successors in interest to quiet title to private easements.[13] The sellers had attempted to nullify easements that had been created in short plats by quit claiming the easements to themselves.[14] The court concluded that the plain terms of the subdivision statute make it applicable to the extinguishment of a private easement.[15] The court reasoned that the sellers' attempts to extinguish the easements were ineffective because the sellers did not follow statutory and

---

[10] See Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002) (the meaning of a statute may be derived from all the legislature has said in the statute and related statutes that disclose legislative intent about the provision in question).

[11] 135 Wn. App. 647, 655,145 P.3d 411 (2006), review denied, 161 Wn.2d 1012 (2007).

[12] Id. at 659, 661.

[13] Id. at 652.

[14] Id. at 651.

[15] Id. at 661.

county procedures for extinguishing the easements by amending the short plat.[16]

The court also noted that Yakima County was properly a party in the action.[17] The court observed that the purpose of the subdivision statute is to "'regulate the subdivision of land . . . .'" and that "'the process by which land is divided is a matter of state concern and should be administered . . . by cities, towns, and counties throughout the state.'"[18] The court concluded that the county's regulations have the same purpose as the statute.[19] Further, the court concluded that the county's interest in having easements established through a platting process extinguished through a plat amendment process was consistent with the subdivision statute and county code.[20]

Here, unlike in M.K.K.I., the relevant legislative authority charged with administering any local codes based on RCW 58.17.215 is not a party to this proceeding. Neither side in this case addressed, either below or on appeal, whether or to what extent this difference is important for purposes of applying the statute to this case. In the absence of argument to the contrary, we assume the Gables may assert the statute in support of their case without joinder of the relevant legislative authority.

More importantly, there is nothing in the partial summary judgment order

---

[16] Id. at 660.

[17] Id. at 661.

[18] Id. at 661 (quoting RCW 58.17.010).

[19] Id. at 661.

[20] Id.

indicating why the trial court did not address the effect, if any, of RCW 58.17.215. The Gables argued the point below, but the court implicitly rejected their argument without explaining why.

We conclude from our consideration of these principles that the Carlsons were not entitled to a partial judgment as a matter of law.

The Carlsons argue that a short plat, S90S0390 recorded in 1995 under King County Auditor's Number 9504279004, in effect, ratifies the actions reflected in the Declaration of Easement executed and recorded in 1989. Thus, they urge they were entitled to a partial judgment as a matter of law. Based on a close reading of the face of the 1995 short plat, we must disagree.

The legal description of the 1995 short plat states in relevant part as follows:

> Lot 4, King County Short Plat No. 284056, recorded under recording number 8507250841 (being a re-recording of short plat recorded under recording number 8506100631), in King County, Washington;
>
> *TOGETHER WITH the Easterly 20 feet of* ***Lot 1, King County short plat number 777026***, recorded under recording number 7806080588;
>
> (ALSO KNOWN AS Lot B of unrecorded King County lot line adjustment number 8903028)
>
> *TOGETHER WITH an easement for ingress and egress as described by instrument recorded under recording number* ***8902270869****.*
>
> *SUBJECT TO an easement for access road over a portion of the Easterly 20 feet of* ***said Lot 1*****;**
>
> *TOGETHER WITH AND SUBJECT TO covenants, conditions, restrictions, dedications, agreements and notes recorded under recording numbers* 8507250841, ***8902270869***, 7212290465, 8506100630, 7907270862, 8507190495, 9312202073 AND 9405270613;

> SUBJECT TO right of the public to make necessary slopes for cuts or fills in the reasonable original grading of streets, avenues, alleys and roads as dedicated in the short plat . . . .[21]

As the language emphasized above in the second paragraph shows, this short plat includes a portion of the property (the *"Easterly 20 feet of Lot 1…"*) that was the subject of the 1978 short plat (# 777026). That short plat includes the easement over the Carlsons' property, the existence of which is at issue here.

Moreover, the 1995 short plat expressly gives effect, in the fourth paragraph, to the part of the 1989 declaration *granting* an easement (*TOGETHER WITH an easement for ingress and egress as described by instrument recorded under recording number* ***8902270869***). This easement grants access to and from 152nd Ave. N.E., located on the eastern boundary of the short plat.

Finally, it is arguable that the language in the sixth paragraph also gives effect to the portion of the 1989 declaration that extinguishes the 1978 easement ("*TOGETHER WITH AND SUBJECT TO covenants, conditions, restrictions, dedications, agreements and notes recorded under recording numbers* 8507250841, ***8902270869*** . . . ."). The relevant language in the 1989 declaration expressly states: "This easement replaces and voids access shown on short plat ***248056*** from 148th Ave. N.E."[22]

---

[21] Clerk's Papers at 1153. Counsel for the parties have provided to this court an enlarged version of the document in the record at Clerk's Papers 1153 so that the legal description and other matters on the 1995 short plat are legible.

[22] The plat number is incorrect. But we assume for our purposes that the

Nevertheless, the argument that the 1995 short plat completely ratifies the 1989 declaration has less force when one considers the language in the fifth paragraph of the above legal description. Specifically, that language states that the platted property is: "*SUBJECT TO an easement for access road over a portion of the Easterly 20 feet of* ***said Lot*** 1." The only easement that fits this description is the 1978 easement across what was then Lot 1. This observation is further buttressed by the dotted lines that appear on the westerly 20 feet of this short plat, a point the Gables argue in their brief and also stated at oral argument.

It is unclear why the legislative authority would give partial effect to the 1989 declaration by expressly making the 1995 short plat "SUBJECT TO" the easement granted in that declaration, while not also extinguishing the 1978 easement as the declaration clearly states. We see nothing in the declaration that indicates that the then owner of the 1978 easement intended anything less than full extinguishment of it in conjunction with granting of the new easement to 152nd Ave. N.E. Nevertheless, the language on the face of the 1995 recorded short plat expressly reaffirms the existence of the 1978 easement. In short, the 1995 short plat does not ratify the portion of the 1989 Declaration of Easement that purports to extinguish the 1978 easement. Accordingly, the easement was not legally extinguished.

The Gables also contend that the 1995 short plat is not an amendment of

---

transposition of numbers is likely a scrivener's error, there being no short plat 248056. This assumption is not important for purposes of our analysis.

the 1978 short plat that created the 1978 easement. Thus, according to them, the 1995 short plat does not comply with the requirements of RCW 58.17.215. They also claim that the fact that they had constructive and actual notice of the recorded 1989 Declaration of Easement does not bar their use of this statute to support their case. Further, they argue that if notice is to be factored into the analysis, then the Carlsons accepted title to their lot believing that it was burdened by the easement, which "would outweigh any constructive notice the Gables had."[23] Finally, they argue that the only fact they had constructive notice of was an ineffective attempt to extinguish the 1978 easement. Because of our conclusion that the language stated on the face of the 1995 short plat does not fully ratify the 1989 Declaration of Easement to the extent it purports to extinguish the 1978 easement, we need not address these additional arguments.

In sum, the 1989 Declaration of Easement was not legally effective to extinguish the 1978 easement created by short plat to which the Carlsons' property is subject. We must reverse the partial summary judgment in their favor.

ABANDONMENT CLAIM

The Gables argue the trial court erred in denying their motion for summary dismissal of the Carlsons' abandonment claim. We disagree.

"Extinguishing an easement through abandonment requires more than mere nonuse—the nonuse 'must be accompanied with the express or implied

[23] Reply Brief of Appellant at 4.

intention of abandonment.'"[24]

Here, this record contains disputed facts over whether the Gables or their predecessors in interest ceased to use the easement and intended to abandon it. Because genuine issues of material fact remained at the time of their summary judgment motion as to whether the 1978 easement was abandoned, the trial court properly denied the Gables' motion.

TRESPASS

We now consider the effect of our reversal of the partial summary judgment order on the rulings at the bench trial that followed.

According to the unchallenged findings and conclusions that the trial court entered, the trial was limited to "(1) trespass and damage to the Logging Trail under the common law and RCW 4.24.630 and (2) whether the Gables had trespassed and damaged an area of land along the Carlsons' eastern property line where it adjoins the Gables' property."[25]

Eastern Border Area

The trial court's unchallenged Finding of Fact 24 states that "[T]he Gables admit to one trespass on the Carlsons' property in 2004 when Mr. Gable was burning debris in the Disputed Area." Based on that admitted trespass, the court awarded the Carlsons $100.00 in damages. There was no damages award for clear cutting, removal of trees and vegetation, or damages to the mushroom

[24] Heg v. Alldredge, 157 Wn.2d 154, 161, 137 P.3d 9 (2006) (internal quotations omitted).

[25] Clerk's Papers at 1043.

crop. Thus, the partial summary judgment in favor of the Carlsons does not impact this award, which we affirm.

Logging Trail

This portion of the trial court's damages award is more problematic because we cannot tell from this record whether or to what extent the damages are for activities that fall within areas coextensive with the existing 1978 easement. The trial court judge assumed the easement had been extinguished based on the prior partial summary judgment ruling by another judge, a ruling we have reversed. Accordingly, we vacate the remainder of the damages award and remand for further proceedings.

On remand, the trial court should consider whether the damages previously awarded are for activities within or outside the easement boundary. If outside that area, then it appears there was a trespass entitling the Carlsons to damages, as in the case of the activities near the eastern border. However, if the activities were wholly or partially within the area of the existing easement, the question is whether they were outside the scope of authority granted by the easement and thus qualify as trespassing.

ATTORNEY FEES

Fees at Trial

The Gables argue that the trial court's findings are insufficient to support its award of attorney fees and costs and that remand is required. Based on this

argument and our rulings in this opinion, we vacate the fee award and remand with directions.

In making an award of attorney fees and costs, the trial court is required to establish a record supporting its attorney fee award that is adequate to allow a reviewing court to determine whether the award was reasonable.[26] The amount of the recovery, while relevant to determining the reasonableness of the fee award, is not a conclusive factor.[27] If attorney fees are recoverable for only some of a party's claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues.[28] The trial court need not segregate the time if it determines that the various claims in the litigation are "so related that no reasonable segregation of successful and unsuccessful claims can be made."[29] The determination that fees are reasonable is reviewed for abuse of discretion.[30] We will reverse an award of attorney fees only if the trial court's exercise of discretion was "manifestly unreasonable or based upon untenable grounds or reasons."[31]

---

[26] Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

[27] Id. at 433.

[28] Mayer v. City of Seattle, 102 Wn. App. 66, 79-80, 10 P.3d 408, 415 (2000) (citing Dash Point Village Assocs. v. Exxon Corp., 86 Wn. App. 596, 611, 937 P.2d 1148 (1997)), review denied, 142 Wn.2d 1029 (2001).

[29] Id. (quoting Hume v. American Disposal Co., 124 Wn.2d 656, 673, 880 P.2d 988 (1994)).

[30] Mahler, 135 Wn.2d at 434.

[31] Progressive Animal Welfare Soc'y v. Univ. of Wash., 114 Wn.2d 677, 689, 790 P.2d 604 (1990).

Here, the amount of attorney fees awarded in comparison with the amount of damages recovered is not conclusive. But the current award appears to be based, in part, on work performed on some claims that are no longer successful for the Carlsons. For example, the abandonment of easement claim was not successful below or on appeal. From our reading of the record, this claim was also abandoned prior to trial. Moreover, the 1978 easement was not extinguished by the 1989 Declaration of Easement. Thus, time spent on this claim should not be compensated.

On the other hand, the Carlsons were successful in proving damages for trespass that the Gables admitted. To the extent the trial court, on remand, determines they are entitled to damages for trespass beyond that which the Gables admitted, that time may also be compensated. We are confident that the trial court, within its exercise of discretion, will determine a proper amount of fees and costs and will properly document its decision with findings and conclusions.

We note that there may be an additional fee issue on whether the Gables are entitled to an award of attorney fees under the equitable principle of mutuality of remedy.[32] We express no opinion on this claim.

Further complicating the fee request is whether Civil Rule 68 has application to this case. Again, we express no opinion on this claim because it may involve factors the trial court has not yet determined.

---

[32] See Kaintz v. PLG, Inc., 147 Wn. App. 782, 197 P.3d 710 (2008) (applying principle to prevailing parties in an action pursuant to a statute).

Fees on Appeal

The Carlsons request fees on appeal based on RCW 4.24.630.[33] They have prevailed on appeal to the extent of the trespass damages that we affirmed. To the extent their other trespass damages are reinstated on remand, the Carlsons would also be entitled to fees for this appeal. Pursuant to RAP 18.1(i), we direct the trial court to determine the amount of such fees on appeal and document its rulings with findings and conclusions.

We affirm the judgment to the extent of damages for the admitted trespass on the property, vacate the judgment for the other trespass damages, and remand for further consideration. We reverse the partial summary judgment order.

Cox, J.

WE CONCUR:

[33] Eagle Point Condo. Owners Assn. v. Coy, 102 Wn. App 697, 716, 9 P.3d 898 (2000) (Where a statute authorizes attorney fees to the prevailing party at trial, they are also available on appeal.).

Eddington, J. Becker, J.